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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91209857
Party	Defendant Carlos Deford Bailey and Deford Bailey III
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Date	03/14/2014
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

DEFORD BAILEY, LLC,)	
Opposer,)	OPPOSITION NO. 91209857
)	
-vs-)	APPLICATION SERIAL NO. 85304626
)	
CARLOS DEFORD BAILEY,)	Published in the Official Gazette on
Applicant.)	February 19, 2013

MOTION FOR JUDGMENT ON THE PLEADINGS

COMES NOW Applicants, Carlos Deford Bailey and Deford Bailey III, by and through their attorney, Walter M. Benjamin, and pursuant to F.R.Civ.P. 56(f)(1) Move pursuant to F.R.Civ.P. 12(c) to Dismiss Opposer's Notice of Opposition based on the pleadings, and would show the Trademark Trial and Appeal Board as follows:

1. Pursuant to F.R.Civ.P. 12(b)(6) Opposers has failed to present a claim upon which relief can be granted; The TTAB has denied all of claims of Opposer's original notice of opposition and Opposer has failed to cure the defects.
2. Opposer's Motion for Leave to Amend their Notice of Opposition should be denied for failure to cure deficiencies by amendments previously allowed; and
3. Opposer's Motion for Leave to Amend their Notice of Opposition should be denied owing to the futility of their proposed Amendment to their Notice of Opposition;

WHEREFORE, Applicants should be granted a judgment on the pleadings on the terms in which the TTAB has ruled in its document filed 01.24.2014, and which Opposers have not cured.

RESPONSE TO MOTION TO AMEND PLEADINGS

COMES NOW Applicants, Carlos Deford Bailey and Deford Bailey III, by and through their

attorney, Walter M. Benjamin, and for their Response to Opposer's Motion to Amend their Notice of Opposition, submits the following:

1. Opposers have filed a Motion to Amend Notice of Opposition with an Amended Notice of Opposition as an Attachment but without an actual Motion to Amend Notice of Opposition
2. TTAB in its document filed on January 24, 2014, citing deficiencies in Opposer's Notice of Opposition, granted Opposers leave of 30 days in which to amend their Notice of Opposition;
3. The Motion to Amend Notice of Opposition should be denied for failure to cure the deficiencies noted by the Appeal Board in its document filed on January 24, 2014;
4. The Motion to Amend Notice of Opposition should be denied owing to the futility of its Amended Notice of Opposition;
5. Opposers Motion to Amend Notice of Opposition does not conform to 37 C.F.R. 2.127 and 37 C.F.R. 2.126; and
6. Opposers have not filed an Amended Notice of Opposition.

WHEREFORE, Applicants, Carlos Deford Bailey and Deford Bailey III pray that Opposers Motion to Amend Notice of Opposition be denied.

APPLICANTS RESPONSE TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Applicants, Carlos Deford Bailey and Deford Bailey III, by and through their attorney, Walter M. Benjamin, and for their response to Opposer's Motion for Summary Judgment submits the following:

1. In its document filed on January 24 2014, the Trademark Trial and Appeal Board has denied Opposer's Motion for Summary Judgment based on Opposer's Original

Notice of Opposition;

2. If the Trademark Trial and Appeal Board regards Opposer's Motion for leave to Amend Notice of Opposition as the filing of an Amended Notice of Opposition in response to their document of January 24, 2014, Applicants should have an opportunity to Answer any newly pleaded matter Pursuant to 37 C.F.R. 2.105;
3. Opposer in their proposed Amended Notice of Opposition do not state a claim upon which relief can be granted;
4. Deford Bailey III authorized the filing of the present application for registration of the mark DEFORD BAILEY. (See Affidavit of Attorney Walter M. Benjamin). Attorney for Opposers has not disclosed to the TTAB Applicant's response to Opposer's Request for Admissions wherein Deford Bailey III signed under oath the truthfulness of his response that he cannot admit that he didn't agree to the filing of the subject trademark application;
5. Opposers in their Original Notice of Opposition and Proposed Amended Notice of Opposition shows that Christine Lamb and Dezoral Thomas also have rights to the name and likeness of Deford Bailey, but have not plead that they oppose Applicants' Petition for Registration. (See Original Notice of Opposition paragraph 3 and the proposed Amended Notice of Opposition, paragraph 3);
6. With additional time, Applicants can produce affidavits to show that Christine Lamb and/or Dezoral Thomas does not oppose Applicants registration.
7. Since Opposers has plead new matter in their proposed amended notice of opposition, Applicants should be granted additional time to refute the newly plead allegations.

8. There are material issues of material facts in dispute as follows:
- a. Whether Deford Bailey III authorized the filing of the subject trademark registration; (See Applicant's Attorney's Affidavit Attached).
 - b. Whether Deford Bailey, Jr. has the right to grant any rights to his Father's name and likeness to Shemika Wiley; Opposers have not offered any law that says that Deford Bailey, Jr. Can grant his right to his father's name and likeness to the exclusion of his father's other heirs.
 - c. Whether Deford Bailey, Jr. was competent to grant any rights to his Father's name and likeness to Shamika Wiley; See Applicants Answer to Opposition, paragraph 5.
 - c. Whether Deford Bailey, Jr. in fact granted any rights to his Father's name and likeness; Deford Bailey, Jr. Is now deceased. (See Opposer's proposed amended notice of opposition, paragraph 3); what happened to his right to his father's name after Deford Bailey, Jr. Died?.
 - c. Whether the other heirs, Christine Lamb and Dezoral Thomas agrees to Applicants Registration of the subject Mark;
 - d. Whether Deford Bailey LLC owned anything to license to Carlos Deford Bailey; Whether license has any meaning if Applicants filed their application for registration two years prior to alleged license.
 - e. Whether the alleged licence was procured just for the purpose of opposing this trademark registration;
 - f. Whether if Applicants had and extension of time, they could bring forward affidavits to refute the claims of the proposed Amended Notice of

Opposition;

- g. Whether facts supporting Applicant's affirmative defenses of laches, estoppel and acquiescence are true; See Applicants Answer to Notice of Opposition, paragraphs 7 - 20.

WHEREFORE Appellants, Carlos Deford Bailey and Deford Bailey III, by and through their Attorney of record, Walter M. Benjamin having shown that there are genuine issues of material facts and that Opposer's Motion for Summary Judgment should be denied or in the alternative Applicants pray that they be given an extension of time in which to present affidavits to further support their Response.

BRIEF IN SUPPORT PLEADINGS

BRIEF IN SUPPORT OF MOTION ON THE PLEADINGS

Applicants' Motion for Judgment on the Pleadings seeks to dismiss Opposers' claims in the Amended Notice of Opposition pursuant to Fed.R.Civ.P. 12(c). Rule 12(c) states that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed.R.Civ.P. 12(c). "The Rule 12(c) motion may be employed by the defendant as a vehicle for raising several of the defenses enumerated in Rule 12(b) after the close of the pleadings.... In this context, Rule 12(c) is merely serving as an auxiliary or supplementary procedural device to determine the sufficiency of the case before proceeding any further and investing additional resources in it." 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1367 (3d ed. 2002).

In the instant case, Opposers filed their Motion for Summary Judgment a day before Opposers pretrial disclosures are due. See Notice of Trial Dates Sent, Answer due, filed

03.20.3013. Rule 12(c) motions under the standards applicable to motions under Rule 12(b)(6)

for failure to state a claim. Park University Enterprises, Inc. v. American Casualty Co. of Reading, PA, 442 F.3d 1239, 1244 (10th Cir.2006). Under Rule 12(b)(6), the court must “accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff.” Jordan–Arapahoe, LLP v. Board of County Com'rs of County of Arapahoe, 633 F.3d 1022, 1025 (10th Cir.2011). “To survive a 12(b)(6) motion to dismiss, a plaintiff must allege that ‘enough factual matter, taken as true, [makes] his claim for relief ... plausible on its face.’ ” *Id.* (quotation and internal quotation marks omitted). “A claim has facial plausibility when the [pleaded] factual content [] allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937 1940, 173 L.Ed.2d 868 (2009)). Plaintiff “must include enough facts to ‘nudge[] [his] claims across the line from conceivable to plausible.’ ” Dennis v. Watco Cos., Inc., 631 F.3d 1303, 1305 (10th Cir.2011) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

The Court should grant leave to amend a complaint “freely ... when justice so requires.” Fed.R.Civ.P. 15(a)(2). Leave to amend need not be given, however, “upon a showing of, failure to cure deficiencies by amendments previously allowed, or futility of amendment.”

1. ~~Frank v. U.S. West, Inc.~~, [3 F.3d 1357](#), 1365 (10th Cir.1993) (citing Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). As noted above, Applicants argues that the Motion to Amend should be denied because each proposed claim or amendment is futile. The Court should also notes the application of Fed.R.Civ.P. 16(b) to the relief requested.

Opposers have not pleaded sufficient facts in their proposed amended notice of opposition

to cure the defect of pleading that Applicants do not have a legitimate ownership interest. See the Board document of 01.24.2014, page 1.

Opposers have not pleaded sufficient facts in their proposed amended notice of opposition to cure the defect that by adding his brother, Deford Bailey III, Applicants have intent to deceived the USPTO into issuing a registration to which applicants are not entitled. See the Board document of 01.24.2014, page 3.

Opposers have not pleaded sufficient facts in their proposed amended notice of opposition to cure the defect of not having plead facts that would support a false suggestion or support a claim that there is a likelihood of confusion under Trademark Act Section 2(d). See the Board document of 01.24.2014, page 3-4.

WHEREFORE Applicants pray that in view of the brief above that Applicants' Motion for judgment on the pleading be granted.

BRIEF IN SUPPORT OF RESPONSE TO MOTION TO AMEND NOTICE OF OPPOSITION

Applicants incorporates by reference their brief under their Motion on the Pleadings above. Based on the arugment above, the motion to amend should be denied because the proposed Amended Notice of Opposition does not overcome the Board's denial of Opposer's Motion for Summary Judgment as argued above.

Additionally, 37 C.F.R. 2.127 requires that a Motion must be in written form, be accompanied by a brief and meet the requirements of 37 C.F.R. 2.126. Opposer's Motion to Amend Notification of Opposition does not meet any of those requirements.

In its document of 1.24.2014, The Board has given Opposers 30 days to respond to is denial

of their Motion for Summary Judgment which includes leave for the filing of an Amended Notice of Opposition. Opposers have not filed an Amended Notice of Opposition. They merely filed a Motion for leave to file an Amended Notice of Opposition with a proposed Amended Notice of Opposition submitted as an attachment. An attachment is not regarded as a filed document, rather as a supplement to the actually filed document. Consequently, Opposers have not filed an Amended Notice of Opposition within the time limit allowed.

BRIEF IN SUPPORT OF RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Applicants incorporate by reference the Briefs in the Motion for Judgment upon the Pleadings and Response to Opposer's Motion for leave to Amend. Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. "[T]he standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a). . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505 2511, 91 L.Ed.2d 202 (1986).

A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. Opposers have failed to do this.

Applicants have clearly shown that there are genuine issues of material facts that should be decided before judgment in this case.

WHEREFORE Applicants by and through their attorney, Walter M. Benjamin, pray that in view of the briefs above, Opposer's Motion for summary judgment be denied, in the alternative, Applicants should be granted more time in which to respond based on new issues raised in the proposed amended notice of opposition.

Respectfully submitted,
Carlos Deford Bailey
Deford Bailey, III

By: /s/ Walter M. Benjamin
Walter M. Benjamin
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Certificate of Service

I, Walter M. Benjamin, hereby certify that on the 14th day of March, 2014, he sent by electronic communication and fascimile a true and correct copy of the foregoing Motion for Judgment on the Pleadings, Response to Motion to Amend and Response to Motion for Summary Judgment addressed to:

Maria A. Spear
Amy J. Everhart
(615) 800-8918 fax
amy@everhartlawfirm.com

/s Walter M. Benjamin
Walter M. Benjamin

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AFFIDAVIT OF ATTORNEY WALTER M. BENJAMIN

STATE OF OKLAHOMA)	
)	ss.
County of Tulsa)	

I, Walter M. Benjamin, being of age and duly sworn under oath, states as follows:

1. That I have practiced before the United States Patent and Trademark Office since 1976 first as a patent agent and since 1977 as a patent attorney, registration No. 28185;
2. That I have been admitted to practice in the State of Oklahoma since 1982, Bar No. 702.
3. That I have a document signed by Carlos Deford Bailey and Deford Bailey III authorizing me to represent them in the registration of the trademark DEFORD BAILEY for the musical instrument, harmonica.
4. Pursuant to that authorization, I have represented applicants in the present case.
5. I have spoken to both applicants on several occasions by telephone.
6. I have utilized Ronald Bailey, a resident of Tulsa, Oklahoma, to contact the applicants in person on occasions for the purpose of the present application.

Futther, Affriant sayeth naught.

Mnm

Walter M. Benjamin

Subscribed and sworn to before me this 14th day of March, 2014.

Notary Public

My commission expires _____.

